

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

AMERICAN SECURITY PROGRAMS, INC.

and

Case 5-CA-211315

UNION PATRIOTS OF PLAZA

*Clark C. Brinker, Esq.*, for the General Counsel  
*Jason M. Branciforte and Tony W. Torain, II, Esqs.*  
(*Littler Mendelson, P.C.*), Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Washington, District of Columbia on September 12, 2018. The complaint alleges that American Security Programs, Inc. (the Company or Respondent) unilaterally implemented its last contract proposal and changed employees' terms and conditions of employment, including wage rates and health, welfare and pension contributions, without first bargaining with the Charging Party, the Union Patriots of Plaza (the Union), to an overall good-faith impasse for a collective-bargaining agreement (CBA) in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).<sup>1</sup> The Company admits that it unilaterally implemented its last contract proposal, but did so only after it reached a lawful, good faith impasse with the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Company and the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation with an office and place of business in Reston, Virginia, has been engaged in the business of providing security services to various industries and government agencies outside the State of Virginia, including the Federal Protective Service at various locations in Washington, D.C., valued in excess of \$50,000. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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<sup>1</sup> 29 U.S.C. §§ 151-169.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. The Company's Operations

The Company provides contract security services to the federal government at various locations throughout the Washington, DC metropolitan area. The contracts at issue are with the Federal Protective Services (FPS), an agency within the Department of Homeland Security, and involve security officers assigned to 395 and 375 E Street, S.W., Washington, D.C. (395 or 375 employees). These locations are also referred to as Patriots Plaza I and II, respectively.

To obtain a contract with FPS, companies submit proposals, including wages and benefits, responding to FPS's request for a quotation. As a federal agency, FPS contracts over \$2,500 fall under the McNamara –O'Hara Service Contract Act (SCA), 41 U.S.C. § 6701 *et seq.*, The SCA requires general contractors and subcontractors performing services on covered federal or District of Columbia contracts in excess of \$2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality as determined by the United States Department of Labor, or the rates contained in a predecessor contractor's collective bargaining agreement. This is also known as the prevailing wage.

SCA regulations are enforced by the United States Department of Labor (DOL), which issues wage determination orders setting the minimum wages that contractors must pay to their employees on federal contracts. Contractors can, however, pay higher wages than those set by the DOL. If an employer has a CBA with a union that contains wages and benefits for its security officers, it has to submit the CBA to FPS as part of the bid. In such instances, the FPS generally considers the CBA to be the wage determination and reimburses the company at the higher rates in the CBA for the security officers' wages and benefits. The FPS-approved higher rate is then paid to the unit employees. As a result, the contractor maintains the same profits regardless of the wage rate, so long as FPS reimburses the contractor at that rate. The Company, a federal contractor for at least the past ten years, has never paid its employees a higher wage rate than what FPS has paid the Company.

On October 1, 2011, the Company was awarded a one-year contract by FPS to provide security services at Patriots Plaza (the 2011 contract). The 2011 contract term also included four option years, all exercised by FPS and the last of which expired on September 30, 2016. The Company's CBA with the National Association of Special Police and Security Officers (NASPSO), the predecessor union, also expired on that date. At the Company's request, FPS extended the 2011 contract until September 30, 2017.<sup>2</sup> During the additional year, FPS paid the Company the same amount for wages and benefits that were paid pursuant to the expired CBA with NASPSO.<sup>3</sup>

On June 21, the Company bid on a new FPS security services contract at 375 and 395 E Street commencing December 1. On August 31, FPS awarded the new contract to the Company.

<sup>2</sup> All dates hereinafter refer to 2017 unless otherwise indicated.

<sup>3</sup> R. Exh. 5.

On September 26, with the 2011 contract expiring five days later, FPS extended that contract until March 31, 2018.<sup>4</sup> Wages and benefits remained the same during this period.<sup>5</sup>

### *B. The Collective-Bargaining Agreement*

Prior to September 2016, NASPSO represented the security officers employed by the Company at Patriots Plaza I and II.<sup>6</sup> The CBA with NASPSO at Patriots Plaza I and II expired on September 30, 2016.<sup>7</sup> Sometime before that contract expired, the security officers decided to withdraw from NASPSO and form a Union to represent themselves. Rondell Cropper, a security officer at Patriots Plaza II with no prior labor experience, became the Union's president and was instrumental in petitioning the Board for certification of the Union as the exclusive collective bargaining representative of security officers at Patriots Plaza I and II.<sup>8</sup> The Union won the subsequent election and, on September 2, 2016, was certified as the exclusive collective-bargaining representative of the following unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time security officers employed by the [Company] at the Patriots Plaza I and II Buildings currently located at 395 and 375 E Street, S.W., Washington, D.C.; but excluding all office clerical employees, managerial employees, and supervisors as defined in the Act.<sup>9</sup>

### *C. The Bargaining Sessions*

#### 1. May 19

Negotiations with the Union did not commence until May, over eight months after certification. All bargaining sessions were conducted at the Company's corporate office.<sup>10</sup> Mark Phinney, vice president of government operations, was the Company's lead negotiator, assisted by human resources manager Sylvia Martinez and administrative assistant Siobhan Bloomer. Cropper and shop steward David Harris negotiated on behalf of the Union, assisted by vice president Dorian Brown and recording secretary Jacqueline Anderson.

At the first meeting, the parties exchanged initial CBA model proposals. After the Union refused to review the Company's proposed model, the Company left the room to review the

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<sup>4</sup> R. Exh. 3.

<sup>5</sup> R. Exh. 6-8.

<sup>6</sup> R. Exh. 1-2.

<sup>7</sup> R. Exh. 1-2.

<sup>8</sup> Cropper had no prior membership in a labor organization or experience in collective bargaining. (Tr. 19, 24.)

<sup>9</sup> Company employees assigned to another building, Patriots Plaza III, are represented in labor matters by another labor organization, Union Rights for Security Officers (URSO).

<sup>10</sup> The parties did not share bargaining notes as to what they agreed to, although Cropper notated agreements as to the noneconomic portions on his draft. He incorporated the agreed upon provisions into an updated version of the Union's model CBA after each meeting. His last update was made after the September 1 meeting. (Jt. Exh. 23; GC Exh. 2; Tr. 45-48.)

Union's version. Sometime later, the Company representatives returned to the conference room. Phinney informed Cropper that the Company agreed to proceed with bargaining based on the Union's CBA template.<sup>11</sup> He also reminded Cropper that unit employees were facing wage determination.<sup>12</sup> Although the Union's CBA included economic proposals (wages, health and welfare benefits), the parties did not discuss any of those provisions, which sought to treat Patriots Plaza I and II equally and pay the officers a wage that escalated each year on October 1.

## 2. May 26

At the second meeting, Phinney read the Union's proposal and agreed to the \$6 proposal for health and welfare. No other economics were discussed at the second meeting. Also at the second meeting, the parties discussed the issue of temporary employees. The Union expressed its opposition to having temporary employees work at the facility and the Company agreed to drop this point.

## 3. June 30

The parties met again on June 30 and bargained over the noneconomic provisions. After the June 30 meeting, Bloomer emailed Cropper the Company's proposed language for several provisions: Article 11 (No Strike No Lockout), Article 15 (Jury Duty) and Article 20 (Training and Requalification).<sup>13</sup>

## 4. August 3 and 18

The parties met on August 3 and 18. During these meetings and the rest of the month, they discussed and agreed to several topics, including gear-up and gear-down time, compensation for break time, jury duty, firearm licensing and qualification, and holiday pay. The parties also exchanged proposals on duty and leave pay, but did not reach agreement at that time.

On August 21, Harris emailed Phinney a copy of the CBA for a nearby "sister building" staffed by Union members:

As we discussed in CBA negotiations on Friday, August 18, 2017, you will see the current base rate, health & welfare, and pension for our sister building 500 C. st. as of September 1, 2016. Base rate \$29.00 H&W \$6.00 Pension \$1.19.

According to sources a new CBA agreement is about to be signed any day now with the new wages to go into effect as follows: Base rate \$33.00 H&W \$7.00 Pension \$1.59.

Now when you cross reference, the current rates and pending rates of our sister contract, compared to what we are asking for, you shall see it's the market rate. Please keep in account that on Friday August 18, 2017, Mr. Phinney you read the old CBA agreements

<sup>11</sup> GC Exh. 1.

<sup>12</sup> It is undisputed that Phinney told Cropper prior to their first bargaining session that unit employees were facing "wage determination" and he wanted to have a CBA in place by September 19.

<sup>13</sup> Jt. Exh. 2-4.

of PP1 and PP2, and seen that we didn't receive any type wage increase in 3-4 years. Thank you in advance for your time and we will be looking forward to meeting with you soon.<sup>14</sup>

5 On August 31, in preparation for the bargaining session the next day, Phinney emailed Cropper a FPS listing of applicable wage determination rates in the absence of CBA rates:

10 The attachment is the notice from FPS indicating which sites have a CBA in effect. Please note that DC0208 and DC0175 are at WD or Wage Determination. This is highlighted in green.

15 I wanted to make sure we have an understanding about tomorrows negotiation. Following up from previous meetings, we have discussed that we will need two separate CBA'S or use one CBA but with a separate economics for each site. We will not be able to use one CBA for these two sites using the same economics, this will not be feasible and we will not be able to continue our negotiations.

20 However, from the above attachment we are running out of time. Please let me know where you stand on separate economics.<sup>15</sup>

#### 5. September 1

25 By the end of the September 1 meeting, the parties had agreed upon all of the noneconomic terms, including hours required for full-time work. At that point, Phinney said the parties no longer needed to meet and could communicate regarding the economic terms by email.<sup>16</sup>

#### *D. Bargaining Over the Economic Terms*

30 On September 8, the Company submitted its first economic proposal, an offer to pay 395 employees \$25.85 on October 1, \$26.40 on October 1, 2018, and \$26.95 on October 1, 2019. For the officers at 375, the Company offered to pay \$22.75 on October 1, \$23.90 on October 1, 2018, and \$25.10 on October 1, 2019.<sup>17</sup>

35 On September 11, the Union counteroffered with a wage reduction of \$.0.10 less per hour for each proposed year:

40 Attached to this email is a copy of our counter offer to your recent email received on Friday September 8, 2017. Please Mr. Phinney if we need to get a mediator involved to resolve these wage issues please let us know asap. Thank you in advance for your time and have a nice day.<sup>18</sup>

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<sup>14</sup> Jt. Exh. 5.

<sup>15</sup> Jt. Exh. 6.

<sup>16</sup> This finding is based on Cropper's undisputed and credible testimony. (GC Exh. 2; Tr. 44-48.)

<sup>17</sup> Jt. Exh. 7.

<sup>18</sup> While I credit Cropper's testimony that he consulted with a mediator, I did not give weight to the uncorroborated hearsay statements allegedly made to him by the mediator. (Tr. 55-57; Jt. Exh. 8.) See

Phinney responded the same day with a counteroffer raising the hourly rates for 375 employees by \$0.25 in 2017, \$0.50 in 2018 and \$1.25 in 2019. He did not, however, propose any change to his previous wage offer for 395 employees and the benefits of employees of both buildings. Nor did he address the Union's request for mediation.<sup>19</sup>

On September 12, the Union counteroffered by proposing wages of \$28.89 on October 1, \$31.89 on October 1, 2018 and \$34.15 on October 1, 2019 for 395 employees. For 375 employees, the Union proposed \$25.85 on October 1, \$29.85 on October 1, 2018, and \$34.15 on October 1, 2019. The email also included an explanation that the proposal was based on a comparison of wage rates paid at nearby locations staffed by private security officers and, once again, proposed mediation:

Attached to this email you will find two (2) attachments, 1 the counter offer from the [Union], and 2 a site comparison of PSO sites within a 10 minute radius of 395 and 375. Now the last time we had a meeting at the corporate office in Virginia, you mentioned that you willing to give up a 3.5% wage increase each year for PP1 395 didn't receive a pay increase. Well as it stands 395 and 375 **didn't** receive a wage increase in 2014, 2015, 2016, and 2017. Now, if you multiply **4 (years) x 3.5% = 14% + \$25.34 (base rate) = \$28.89 new base rate.** (emphasis in original)

Also if you look at the site comparison chart of your competition that I attached, you will find that the average salary according to 2016 standards, we also separated the buildings 395 & 375 at your request Mr. Phinney. What more can you ask for, many of those other sites pay uniform allowance, shift differential, boot allowance, sick/personal leave up to 88 hours and etc. All that we are asking for is not to be paid the highest wages but a fair wage. Mr. Phinney we have come to an agreement on the entire CBA so far, lets resolve this final issue and continue moving forward in the right direction. If need be I can provide to you the CBA agreements of your competition so you can see and read the wages for yourself, the same way I provided to you the CBA of our sister building FEMA 500 C. ST that we used to be attached to. Once again Mr. Phinney, if we can't resolve these minor wage issues and come to some type of agreement on our own. The [Union] isn't obliged to the idea of seeking the help of a federal mediator from the Department of Labor to resolve all wage disagreements.

Read over the information that I've provided to you and let's sign a deal, we will be looking forward to hearing from you soon. Thank you in advance for your time and have a nice day.<sup>20</sup>

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*RJR Communications, Inc.*, 248 NLRB 920, 921 (1980) ("hearsay evidence is admissible before administrative agencies, if rationally probative in force and if corroborated by something more than the slightest amount of other evidence).

<sup>19</sup> Jt. Exh. 9.

<sup>20</sup> Taken in context with the rest of this and other statements, Harris' remark that the Union "isn't obliged to the idea" reasonably appears to mean that the Union did not object to the idea of seeking the help of a federal mediator. (Jt. Exh. 10.)

Phinney replied later that day with an explanation as to the factors that the Company was considering with respect to the appropriate wage rate going forward, but did not respond to Harris' request for mediation:

5 I want to be clear I stated I would communicate you for this year and the CPI was 1.5%. I am looking to compensate you for the years going forward and trying to bring 375 up as fast as I can, but I am not going to look back at the last four years. We go forward. I do appreciate all of your information, and I will look at it.<sup>21</sup>

10 Harris replied on September 13, stating that the parties were at a "stalemate" with respect to wages and, searching for a way to create movement on the issue, once again suggested the parties submit the remaining economic issues to mediation:

15 Good morning Mr. Phinney, it seems as you do not understand where the [Union] is coming from pertaining to fair wages. I have provided vital information to [the Company] more than once, proving as to what the fair wages should be for buildings 375 & 395 and you disregarded it. We have agreed 100% on the CBA except the wages portion, and we agreed to every change that you disputed within the new CBA. Since we have come to a stalemate as far as wages are concerned, and you do not want to meet us halfway. I ask you once again; Mr. Phinney do you need [the Union] to contact a federal mediator provided through The Department of Labor to step in and help us resolve this minor issue we are having with you concerning wages? We will be looking forward to receiving your response very soon. Thank you in advance for your time and have a nice day.<sup>22</sup>

25 On September 14, Phinney counteroffered with the Company's "best and final offer" of an hourly wage rate for 395 employees of \$25.95 for 2017, \$26.60 for 2018 and \$27.25 for 2019; and for 375 employees, an hourly wage rate of \$23.20 for 2017, \$25.05 for 2018, and \$27.05 for 2019. Once again, he made no mention of the Union's request for mediation.<sup>23</sup> He followed-up on September 16 in an email to Harris and Cropper, reminding them that "we have to have a CBA by September 19 in order to get the CBA to FPS for them to recognize it."<sup>24</sup>

35 On 12:29 p.m. on September 19, Harris replied, disputing Phinney's assertion that the Company had submitted its best and final offer:

40 You say you have submitted your best and final offer even though it's just a \$0.51 raise to base and \$0.00 for H&W and \$0.00 for pension for 395 after 4 years of no raises. We tried to negotiate with you fairly but only to be disregarded and disrespected. You didn't even try to meet us halfway with wages, H&W and pensions. I submitted our best offer with supporting information as far as PSO building comparisons, the sister contract we

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<sup>21</sup> Jt. Exh. 11.

<sup>22</sup> Phinney's alleged understanding of "stalemate" – that the Union was not going to propose "any other offers or proceed with negotiations as far as wages," is contradicted by the continued exchange of counteroffers by the parties. (Jt. Exh. 12; Tr. 115.)

<sup>23</sup> Jt. Exh. 13.

<sup>24</sup> It is undisputed that applicable federal regulations required the Company to submit a CBA to FPS ten days before the expiration of the contract. (Jt. Exh. 14; Tr. 116.)

were attached before ASP was awarded the Patriot Plaza contract. Not to mention the majority of buildings that were on the list will soon be ASP contracts. So with that being said, you are fully aware of the current wages being paid to PSO's in the NCR, and you chose to disregard it for what reason no one understands. So I guess at this moment we are at a impasse. Thank you for your time and have a nice day.<sup>25</sup>

Phinney responded to Harris at 4:00 p.m. that day with yet another final wage offer and warning that unit employees faced pay cuts if a CBA was not signed by that day:

Knowing that if we don't sign a CBA by COB today everyone at 375 and especially 395 will have their pay rate reduced to wage determination as indicated on the RFQ which I showed you during our negotiations. Therefore in an effort to see that the officers receive an increase, the company is willing to consider a \$.15 increase for 395 E only, to bring the wages to 26.10; everything else staying the same for one year, then renegotiate the Wages, H&W and Pension. This is so the officers do not receive a pay cut.

I need an answer by COB today or I will not be able to present an REA to FPS for any new wages and 375 E and 395 E Street will go to wage determination of \$20.57, H&W of 4.13 with sick [leave] of 56 hours and no pension.<sup>26</sup>

The Union did not respond to that proposal. Unbeknownst to the Union, however, around that time the Company and FPS had been discussing a six-month extension of the expiring contract until March 31, 2018. In connection with that extension, on September 20, John DeSimone, FPS's contracting officer, sought clarification from the Company as to the applicable wages and fringe benefits for the extension.<sup>27</sup> Rachna Koulgi, the Company's vice president for government services, replied on September 26:

Thanks for giving us the additional time to submit the CBA related documentation for the extended option period. Please see attached – the letter for DC0208 (375 E Street) and DC0175 (395 E Street). The CBA DC0331 (500 E Street) is also attached. I'm waiting for the 355 E Street) MOU. Do you have the leeway to wait another couple of hours? Please let me know.

DeSimone acquiesced and later that day Koulgi sent the following letters explaining that the Company was unable, after several bargaining sessions, to reach an agreement with the Union with respect to 375 E Street and 395 E Street:

In order to safeguard the interests of all parties concerned to include the government stakeholder and to not cause significant hardship to our security officers at the above mentioned sites, *[the Company] will honor the economic terms (wages and fringe benefits to include H&W, pension, vacation, holiday, sick leave, relief breaks, etc.) of the latest CBA addendum which effective beginning October 1, 2014* for both the above

<sup>25</sup> Phinney and Cropper testified as to their impressions of what the latter meant by his reference to "impasse," neither of which is controlling here. (Jt. Exh. 15; Tr. 68-69, 117-118.)

<sup>26</sup> Jt. Exh. 16.

<sup>27</sup> R. Exh. 7.



stated locations (enclosed with this correspondence) for the entire duration of the referenced option period (emphasis added).<sup>28</sup>

Koulgi also sent a similar notification to another FPS contracting officer, Debby Abraham.<sup>29</sup> As a result, FPS issued an Amendment of Solicitation/Modification of Contract, dated September 26, and unit employees' wages at 375 and 395 were to remain unchanged during the six-month extension of the FPS contract, which stated in pertinent part:

A. Pursuant to FAR 52.217-8, this modification exercises the six month extension effective October 1, 2017.

B. The following Department of Labor Wage Determinations are incorporated into the contract effective October 1, 2017:

...

The remaining sites (DC0175 and DC0208) on this contract will remain covered under the following Wage Determinations previously incorporated into the contract via P00012 and P00017:

CBA-2013-6080, Revision 1: Collective Bargaining Agreement between American Security Programs, Inc. and National Association of Special Police and Security Officers (NASPO) (covers DC0175)

CBA-2013-6084, Revision 1: Collective Bargaining Agreement between American Security Programs, Inc. and National Association of Special Police and Security Officers (NASPO) (covers DC0208).<sup>30</sup> . . .

On October 21, Phinney, without making any reference to the six-month extension, notified the Union "that the sites at 375 and 395 E Street will go to SCA wage determination as of 12.1.2017 if we don't have a CBA in place as of 10.31.2017. Please contact me if you want to proceed."<sup>31</sup> He provided no explanation as to why the alleged deadline had moved from September 19 to October 31.

On October 23, Cropper responded to Phinney with an alternative approach by the Union with respect to wages and benefits, and seeking a prompt resolution:

Good morning, Mr. Phinney. I am the President of [the Union] we love to have the CBA ratified by 10/31/2017. As we negotiated earlier about the buildings not separated because they are under the same collective bargaining unit, we are at 32.00 base and 6.00 H&W; so if we can get the CBA ratified ASAP our base will not escalate to 33.00 base.

<sup>28</sup> There is no indication in the record that the Company ever made the Union aware of the 6-month contract extension by FPS. (R. Exh. 6-7.)

<sup>29</sup> R. Exh. 5.

<sup>30</sup> Phinney's testimony that he "thought it mainly was for a bridge between October 1st and December 1st, when the new contract was supposed to start," is contradicted by the Company's documentary evidence of the FPS contract extension through March 31, 2018. (Tr. 119-120; R. Exh. 3.).

<sup>31</sup> Jt. Exh. 17.

You have seen the comparison of the NCR, and our base rate is market rate. Thanks again Mr. Phinney for addressing this issue; We hope to come to a prompt resolution.<sup>32</sup>

5 On November 1, the government's contracting officer emailed Koulgi inquiring whether the Company "anticipate[d] any further CBA amendments for the remaining [E street sites] for this contract." Koulgi replied a short while later:

10 The two locations that are operating under CBAs are DC0175 and DC0208 (the officers are currently being paid CBA wages and benefits). Unfortunately, despite our efforts, negotiations are at a standstill since the union representatives are not budging from their demands of a single CBA covering both locations and \$32.00 in wages, \$6.00 in H&W plus other benefits for both sites.

15 Although we have until November 20th technically to submit new CBAs or amendments for incorporation into the contract (subject, I believe to receipt of the task order for the base period), based on the current status of discussions, we do not anticipate executing a CBA/CBAs for these sites.<sup>33</sup>

20 On November 15, Phinney, without mentioning the six-month extension, notified the Union that the Company was moving the deadline again with an offer to avoid wage determination by entering into a Memorandum of Understanding maintaining the status quo as to wages and benefits for an additional year:

25 We have heard from FPS, and they have stated that if we do not reach an agreement by 11.17.2107 and a provide a CBA with agreed upon wages then the two sites 375 E Street and 395 E Street, SW will revert to wage determination of \$20.57 with \$4.13 H&W with the company providing sick leave. At this time [the Company] and the [Union] are too far apart from an agreement on wages to establish a CBA. Therefore, we would offer that the [Union] and [the Company] establish a Memorandum of Understanding and send this forward to FPS which will hold the wages where they are at this time as we continue to work on resolving the wage issue. The resolved wages once agreed to would then be effective 10.1.2018.

35 Therefore, we need to establish this Memorandum of Understanding by 11.17.2017 allowing FPS to look at the situation and make a determination on the Memorandum of Understanding.

40 If approved by FPS, the Memorandum of Understanding's pay rates will go into effect on 12.1.2017, if FPS does not approve the Memorandum of Understanding, we will pay the wage determination pay rates mentioned above.

I have provided a Memorandum of Understanding see attached.<sup>34</sup>

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<sup>32</sup> Jt. Exh. 18.

<sup>33</sup> R. Exh. 9.

<sup>34</sup> Once again, the Company's assertion regarding the alleged deadline are contradicted by the fact that FPS afforded the Company an extension until March 31, 2018 of the wage rates set forth in the 2014

On November 17, Phinney sent the Union a revised final offer with a rate lower than its November 15 offer. It consisted of a proposed CBA with current rates reduced to the  
 5    aforementioned wage determination levels and also threw in new non-economic proposals even  
 though the parties had previously agreed to such provisions by September 1:

10    FPS has reiterated unless they receive a signed agreement by 1700 on 11.20.2017, FPS  
 states that as of December 1, 2017, the officers' pay rate at 375 E Street and 395 E Street  
 (contract # HSHQEC-17-D-00005) would be at wage determination of \$20.57 for wages  
 and \$4.27 for H&W.

15    Therefore, [the Company] is sending this revised Last, Best and Final offer for 375 E  
 Street and 395 E Street sites on the FPS contract # HSHQEC-17-D-00005. After  
 11.20.2017 at 1700, this offer shall be rescinded. If there are any questions, please  
 contact me.<sup>35</sup>

20    In a conversation with Phinney later that day, Cropper rejected Phinney's latest proposal  
 and, once again, urged the Company to agree to submit the remaining economic issues to  
 mediation or arbitration. Phinney replied that he just wanted to know if Cropper received his  
 November 17 email but, once again, ignored the Union's request to engage in mediation.<sup>36</sup>

25    On November 20, Phinney re-sent the Union the Company's "signed Last, Best and Final  
 offer as we have not heard back from you as of Friday 11.17.2017." The proposal reiterated that  
 wages would be set at wage determination, effective as of December 1, and "to be determined"  
 in each of the following years.<sup>37</sup>

30    On November 28, Phinney emailed Cropper and Harris, referencing the Company's offer  
 of November 17 and request that the Union reply by November 20. Omitting any reference to  
 his conversation with Cropper on November 17 and the latter's request that the parties submit the  
 economic issues to mediation or arbitration, Phinney said that the Company would implement  
 immediately its "Best, Last and Final offer unilaterally and will be informing the officers of this  
 change to wage determination of \$20.57 and H&W of \$4.27 as of 12.1.2017."<sup>38</sup> On December 1,  
 the terms of the Company's final offer of November 28 went into effect.

35    Phinney's final email produced a sharp rebuke from Cropper on December 3 and yet  
 another request that the Company agree to engage in mediation or arbitration:

Per conversation November 17, 2017, Mr. Phinney I spoke with you about the  
 memorandum of understanding and said to you as well as Ms Glenita that I will not agree

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NASPSO contract. (Jt. Exh. 19.)

<sup>35</sup> Jt. Exh. 20.

<sup>36</sup> This finding is based on the assertions in Cropper's subsequent email of December 3, none of  
 which were responded to or otherwise disputed by Phinney. (Jt. Exh. 22.)

<sup>37</sup> As previously found, Cropper did in fact respond to Phinney's November 17 email in a  
 conversation later that day. Phinney, however, was simply interested in confirming Cropper's receipt of  
 the email and ignored Cropper's request for continued bargaining through mediation. (Jt. Exh. 21(a)-(b).)

<sup>38</sup> R. Exh. 4.

to the reduction of wages; and your reply was thank you, and I just wanted to know if you received my email. Now if you are determined to undermine scrupulous business practices I suggest that we sincerely need a federal mediator or arbitration to resolve this issue of wages, the union has asked you several of times for a federal mediator and you have not responded. And no! detrimental action was taken against [the Company]. And for you to reduce your employees pay is total retaliation against the union! We will not stand for being taken advantage of you have hard working dedicated employees and you destroyed the morale of [Company] employees. Mr. Phinney if you ever want to talk face to face about 395 and 375 I'm happy to listen, but now you give me no other option except to speak to our representatives in Washington DC.<sup>39</sup>

Phinney did not respond to Cropper's request to bargain and, as was the case with the Union's previous requests for mediation, ignored that request as well.<sup>40</sup>

#### LEGAL ANALYSIS

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of [its] employees." Section 8(d) further defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party."

An employer violates its duty to bargain collectively by unilaterally implementing terms and conditions of employment without first bargaining to impasse or agreement. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); accord *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enforced sub nom. Am. Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991). The party asserting impasse bears the burden of proving it. *Wayneview Care Ctr.*, 664 F.3d 341, 347 (D.C. Cir. 2011).

Impasse exists only if "there [i]s no realistic possibility that continuation of discussion . . . would [be] fruitful" and "the prospects of reaching an agreement ha[ve] been exhausted." *Am. Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d at 628-29. A finding of impasse requires futility, not just frustration. *Powell Electrical Mfg.*, 287 NLRB 969, 973 (1987). In determining whether impasse has been reached, the Board considers the totality of the circumstances, including "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, 163 NLRB at 478. In addition, "continuous negotiating

<sup>39</sup> Jt. Exh. 22.

<sup>40</sup> The vague testimony of Phinney, an experienced bargaining representative, that he "didn't think mediation would help at all," was not credible. That he repeatedly ignored requests for mediation without even the briefest of explanations clearly indicated that he was not interested in achieving a deal on the economic issues prior to any of the shifting deadlines. (Tr. 126.)

progress is strong evidence against an impasse.” *Teamsters Local 175 v. NLRB*, 788 F.2d 27, 31 (D.C. Cir. 1986). One or two factors alone, however, may be sufficient to demonstrate the absence of impasse. See *Monmouth Care Center v. NLRB*, 672 F.3d 1085 (D.C. Cir. 2012).

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### *I. Bargaining History*

The Company had a previous bargaining history with the NASPSO, the predecessor union, but there is no evidence as to the nature of that relationship. In 2016, unit employees replaced NASPSO with the Union. The Union, newly created, had no previous bargaining relationship with the Company or any other employer. Eight months after the Union’s formation, the parties began bargaining over an initial contract. The relationship encountered complications even before bargaining began, however, when the Company advised the Union that bargaining needed to be completed by a government issued deadline. Encountering a newly created labor organization operated entirely by unit employees, the Company had no reason to believe that negotiations would be accomplished quickly or by a certain date unless it accelerated negotiations.

Under the circumstances, the lack of a bargaining history between the parties mitigates against a finding of impasse. See *Grinnell Fire Systems, Inc.*, 328 NLRB 585, 596 (1999), *enfd.* 236 F.3d 187 (4th Cir. 2000), *cert. denied* 122 S.Ct. 49 (2001) (no impasse where there the lack of a significant bargaining history warranted more time to arrive at an initial agreement).

### *II. Good Faith of the Parties During Bargaining*

In determining whether impasse existed, it is inconsequential that the complaint did not allege a lack of good faith bargaining by the Company. As the Supreme Court has explained, “[c]learly, the duty [to meet and confer] thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact— ‘to meet \* \* \* and confer’—about any of the mandatory subjects.” *NLRB v. Katz*, *supra* at 742-743. See also *Grinnell Fire Systems, Inc.*, 328 NLRB at 596-597 (no impasse, notwithstanding the absence of bad faith, where employer expressed unwillingness to move from its position and the union had not offered specific concession, but had declared its intention to be flexible and sought further bargaining).

In any event, the Company’s assertion – that “it consistently demonstrated its desire to reach agreement during its negotiations with the Unions” – is partially correct. While it is true that the parties reached agreement on every provision except wages and benefits by September 1, it is also evident that the Company decelerated negotiations after that date, deciding to forgo in person meetings and, instead, bargain with the inexperienced Union representatives by email. The Company chose this approach even though the most important issues – the economic provisions – remained and it professed the need to submit executed CBAs to FPS, by ever-changing deadlines. Moreover, the Company repeatedly ignored the Union’s requests that the parties submit to mediation or arbitration on the economic issues.

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### III. Length of the Negotiations

The parties met on six occasions between May 19 and September 1, with the first meeting essentially a meet and greet where CBA drafts were exchanged. By September 1, the parties had negotiated and agreed to the non-economic provisions of an initial CBA. Even though the Company advised the Union that it was in a hurry to wrap up bargaining because of the FPS contract and the Union's initial proposal on May 19 included economic proposals, the Company provided no counteroffers to those aspects during the initial three and a half months of bargaining. At the conclusion of the September 1 meeting, the Company's lead negotiator told the Union representatives that further in person bargaining was unnecessary and the parties could negotiate over the remaining issues – the economic terms – by email. He did so even though he told the Union representatives the previous day that “we are running out of time” to complete economic bargaining because of wage determination, a comment that he reiterated on September 8 when the Company submitted its first wage and benefits proposal. Under the circumstances in this case, such an unorthodox approach was a recipe for failure. *See Dish Network Corporation*, 366 NLRB No. 119, slip op. at 3 (2018) (Board “precedent is clear that only in-person, face-to-face meetings satisfy the Act's obligation to meet and confer”).

Although the parties are not expected to participate in a set number of sessions, the Board has found six sessions insufficient to support an impasse. *See Hendrickson Trucking Co.*, 365 NLRB No. 139, slip op. at 22 (2017) (parties met six times, including once before a federal mediator); *U.S. Testing Co.*, 324 NLRB 854, 860–61 (1997), *enfd.* 160 F.3d 14 (D.C. Cir. 1988) (parties were “not at the end of their rope” where economic proposals were exchanged at the fourth of six bargaining sessions); *see also Taft Broadcasting Co.*, *supra* (no impasse after 23 sessions). Also significant is the length of bargaining on the topic or topics upon which alleged impasse is premised. *See Old Man's Home of Philadelphia*, 265 NLRB 1632, 1634 (1982) (limited discussion on issue of wages during a 6 month period in which parties met 17 times was insufficient to establish impasse); *Beverly Farm Foundation, Inc.*, 323 NLRB 787, 793 (1997) (no impasse where parties bargained on economic issues during only 3 of 19 sessions).

In this case, the length of negotiations was remarkably short and the parties did not even meet in person to bargain over economic terms at any time before the Company declared impasse on November 28 and unilaterally reduced unit employees' wages and benefits to the minimum level permitted under federal regulations. The Company exchanged its initial economic proposal on September 8 and revised it several times until its final proposal on November 20. During that time, each party shared in the delays – first, the Union in not responding to the Company's September 19 proposal until October 23, and the Company by delaying three weeks before counteroffering on November 17. Accompanying the Company's proposals were short, ever-changing deadlines precipitated by its FPS contract renewal – first September 19, then October 1, then November 17 and, finally, November 20 (identical to November 17). At the time of the November 17 final offer, which introduced a new economic proposal, albeit a regressive one decreasing wages, and several new non-economic proposals, the Company alluded to a December 1 deadline. Unbeknownst to the Union, that was not true, since FPS had extended the Company's contract until March 31, 2018.<sup>41</sup>

<sup>41</sup> As previously noted, Phinney's vague and unsubstantiated impression regarding a December 1

On November 27, when the Company unilaterally implemented its last final offer of November 20 in order to meet the wage determination deadline, the parties were not at deadlock since the Union had expressed flexibility in its economic counteroffers and a desire to submit the economic issues to mediation. The SCA only established the minimum amount of wages and benefits for unit employees and the Company was free to pay them a higher amount if it chose. The Company, however, coupled each proposed minimal wage increase with a looming deadline due to its reluctance to compensate unit employees at levels much higher than wage determination levels.

Under the circumstances, the Company's unilateral implementation was thus based on an artificial deadline and did not support a finding of impasse. That the Company repeatedly ignored the Union's repeated requests for mediation clearly suggests that it was predetermined to run out the clock and impose the SCA's prevailing wage in lieu of a CBA wage rate. An employer, however, cannot curtail bargaining and declare impasse based on an artificial deadline rather than exhausting all avenues of bargaining. See *Grinnell Fire Systems, Inc.*, 328 NLRB at 598 (no impasse where employer invoked an arbitrary deadline instead of bargaining to deadlock); *Newcor Bay City Division*, 345 NLRB 1229, at 1228-1239 (2005) (no impasse where employer's unilateral action motivated by a rush to implement its own final proposal). As the Board stated in *Management Training Corp.*, 317 NLRB 1355, 1358 (1995):

Thus, the Act ensures that the wages and benefits of employees working for service contractors under a collective-bargaining agreement would not be reduced with a new service contract but would, at a minimum, be in accordance with rates provided in the contract. In these circumstances, to question whether such contractors are able to engage in meaningful bargaining seems anomalous.

#### IV. Importance of the issue over which there is disagreement

It is undisputed that the issues over which there remains disagreement – wages and benefits – were of paramount importance to the parties. *Royal Motor Sales*, 329 NLRB 760, 763 (1999), *enfd.* 2 F. App'x 1, (D.C. Cir. 2001). (“[n]egotiating the details on such important subjects as wages is at the heart of collective bargaining”); *Brotherhood of Locomotive Fireman and Enginemen*, 447 F.2d 1127, 1136 (5th Cir. 1971) (“to each union and to its every member there are no minor disputes, and that all controversies entail economic issues of transcendent importance”). See also dissent of Chairman Miscimarra in *Stein Industries, Inc.*, 365 NLRB No. 31, slip. op at 9 (2017) (“there was no need for the parties to discuss noneconomic matters before the Respondent declared impasse because economic issues were of overriding importance.”). Each party, however, took different approaches in attaining its economic objectives.

The Union incorporated economic proposals in the initial CBA template utilized by the parties. Cognizant of the Company's expressed desire to wrap up negotiations by September 19, the Union accompanied its subsequent offers of September 11, 12 and 13 with suggestions that the parties seek the assistance of a mediator. The Company, on the other hand, engaged in

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deadline is belied by the record. (R. Exh. 3.)

productive bargaining over the noneconomic issues during the first three and a half months without presenting any economic proposals. Its inaction was not likely attributable to a belief that the economics were unimportant, but rather, recognition that they entailed the most difficult bargaining. See *Grinnell Fire Systems, Inc.*, 328 NLRB at 597 (one could expect that bargaining over wages and benefits, “in order to be fruitful, the negotiations would be long and arduous.”).

Given the reality that negotiations over two locations would likely be long and arduous, the Company’s approach was to leverage its position by repeatedly tying its economic proposals to looming FPS contract deadlines. Of great importance to the Company was the need to keep wages and benefits separate for each facility, while it was equally as important for the Union to achieve equalization in wage and benefit rates for unit employees at both facilities. Either way, the parties needed to bargain over 18 rates for the three year term of an initial CBA.

Finally, with the latest of the Company’s alleged wage determination deadlines fast approaching, it obliterated any chance of a quick resolution by suddenly reintroducing noneconomic proposals that had already been agreed upon. The significance of that development was that the Company had placed back on the table topics of importance to it over which the parties’ brief history suggested there was every reason to expect eventual agreement. At the very least, the new proposals required further bargaining. See *Atlantic Queens Bus Corp.*, 362 NLRB No. 65 (2015) (“eleventh-hour changes in the Respondent’s bargaining proposals, particularly on the centrally important issue of healthcare, persuade us that the Respondent was not warranted in assuming that further bargaining would be futile.”).

#### V. *Contemporaneous Understanding of the Parties*

The parties did not have a contemporaneous understanding that further bargaining would be futile when the Company implemented its last, best and final offer on November 27. That it was the last in a series of similar pronouncements by the Company conveying certain wage levels to the Union as last, best and final offers was not unusual. In collective bargaining, as Judge Posner has observed, “[a]fter final offers come more offers,” *Chicago Typographical Union Local 16 v. Chicago Sun Times*, 935 F.2d 1501, 1508 (7th Cir. 1991).

Not surprisingly, the parties continued to exchange proposals even after the Union refused to capitulate to the Company’s “last, best and final” offers by several shifting deadlines – September 19, October 31, November 17 and, finally, November 20. Aside from rejecting the Company’s final proposal to reduce wages and benefits to the wage determination level, the Union consistently conveyed flexibility on the economic issues and suggested bargaining through mediation on September 11, 12 and 13, all prior to the Company’s first artificial deadline of September 19. See *Grinnell Fire Protection Sys. Co.*, 328 NLRB at 585-586 (demonstrations of flexibility and willingness to compromise reflect an understanding that further negotiations could be fruitful and thus cut against a finding of impasse).

Even aside from the parties’ understanding as to where they stood on the economic issues, the Company resurrected several noneconomic issues relating to full-time hours, gear up and gear down time, paid breaks, holiday pay, temporary employees, firearms training and qualifications. As previously explained, the emerging history between the parties indicates that they were unlikely to end up at impasse on any of these topics. If anything, the piling on of a



host of noneconomic issues onto outstanding economic issues at the eleventh hour presented a new platter of options for the parties, negating the notion that further bargaining would have been futile.

5 While the Company reached for the end of its self-imposed rope when it unilaterally reduced wages and benefits on November 27, it is equally as clear that the Union still sought to bargain as evidenced by its December 3 protest, which included another request to mediate the dispute. That response to the Company's final offer of November 27 was not untimely since, unbeknownst to the Union, FPS agreed to reimburse the Company at the expired CBA wage and  
10 benefit rates through March 31, 2018.

On several occasions, an inexperienced unit employee serving as a Union negotiator, cited "impasse" or "stalemate" on the economic issues, but did so in the context of a request that the parties continue bargaining with the assistance of a mediator. In addition, such remarks were  
15 followed by subsequent counteroffers and indications of flexibility, especially the change in approach by the Union on October 23. In such situations, the Board evaluates the utterance of legally significant words in context. See *PRC Recording Co.*, 280 NLRB 615, 635 (1986) (citing *Builders Institute of Westchester County*, 142 NLRB 126, 127 fn. 2 (1963) ([t]he use of words like 'impasse' or 'deadlock' by the parties, even relating to overall issues, does not necessarily  
20 imply that future bargaining would be futile."). That is especially the case where, as here, the statement is made by an inexperienced negotiator. See *Colfor, Inc.*, 282 NLRB 1173, 1180 (1987), *enfd.* 838 F.2d 164 (6th Cir. 1988) (statement by an "untutored negotiator who uses this term of art without legal precision" did not establish the existence of impasse).

25 In any event, even if the parties were at impasse in September when Harris referenced "impasse" and "stalemate," they broke that impasse by continuing to bargain after that time. "The Board and courts have made clear that anything that creates a new possibility of fruitful discussion (even if it does not create the likelihood of agreement) breaks an impasse as do further negotiations and bargaining concessions, implied or explicit." *PRC Recording Co.*, 280 NLRB at  
30 640 (citing cases); *see also Royal Motor Sales*, 329 NLRB at 762 (no valid impasse where union made deadlock breaking proposal 2 days earlier).

Finally, it is irrelevant whether the Company's disregard for the Union's repeated requests for mediation was a deliberate attempt to leverage its economic position by pinning inexperienced  
35 union negotiators against artificial deadlines or mere oversight. The Union's mediation requests, all ignored by the Company, coupled with the Union's continued flexibility on economic issues, establishes that neither had a reasonable belief that they were at impasse. See *Powell Electrical Manufacturing Company*, 287 NLRB at 971 (union's efforts to involve mediator indicated its belief that there was room for movement); *Grinnell Fire Systems, Inc.*, 328 NLRB at 595  
40 (same); *Area Trade Bindery Co.*, 352 NLRB 172, 176 (2008) (same).

## VI. Totality of the Circumstances

45 There is no allegation that the Company's actions or inaction amounted to bad faith. The Company failed, however, to show that any of remaining *Taft Broadcasting Company* factors supported a finding of impasse, as the evidence established that the parties bargained an insufficient length of time over the vitally important economic issues and there was no

contemporaneous understanding in their new relationship that they were at impasse. Because “[b]oth parties must believe that they are at the end of their rope” for impasse to exist, the Union’s conduct reflecting its belief that further negotiations could be fruitful was enough to forestall a finding of impasse. See *PRC Recording Co.*, 280 NLRB at 635 (“anything that creates a new possibility of fruitful discussion . . . breaks an impasse”); cf. *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1116-17 (D.C. Cir. 2001) (finding impasse when the union requested additional meetings, but made no further proposals after the employer announced its final offer). Moreover, to countenance the Company’s total disregard for requests by inexperienced Union representatives to resume in person bargaining, before and after the declared impasse, with the assistance of a mediator is antithetical to the purposes of the Act. See e.g., *Hooker Chemicals & Plastics Corporation*, 224 NLRB 1535, 1538 (1976) (“conciliation is so important to the promotion of stable labor relations”).

Accordingly, I find that the Company violated Section 8(a)(5) and (1) of the Act by declaring an impasse on November 27, 2017 and refusing to meet and bargain before and after it implemented a unilateral change in wages and benefits.

#### CONCLUSIONS OF LAW

1. Respondent, American Security Programs, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, Union Patriots of Plaza, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and, at all material times, was the exclusive collective bargaining representative of the following appropriate units at Respondent's Washington, D.C. facilities:

All full-time and regular part-time security officers employed by the [Company] at the Patriots Plaza I and II Buildings currently located at 395 and 375 E Street, S.W., Washington, D.C.; but excluding all office clerical employees, managerial employees, and supervisors as defined in the Act.

4. By unilaterally implementing the terms of its last, best, and final collective-bargaining agreement offer on November 27, 2017 without bargaining with the Union to a good-faith impasse, the Respondent violated Section 8(a) (5) and (1) of the Act.

5. By failing and refusing to resume bargaining collectively towards a new collective-bargaining agreement on or after November 27, 2017, the Respondent violated Section 8(a)(5) and (1) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, I shall order Respondent to rescind the unlawful unilateral changes contained in its last, best and final offer and unlawfully implemented/made on about November 27, 2017, regarding the unit employees' terms and conditions of employment, if the Union requests, and to restore the status quo ante, if the Union requests, that existed prior to the changes until such time as Respondent begins to bargain with the Union in good faith to a collective-bargaining agreement or good-faith impasse. This obligation also includes that Respondent immediately begin to bargain in good faith with the Union to a new collective-bargaining agreement or bona fide impasse.

The Respondent shall be ordered to make whole any unit employees affected by the unlawful unilateral changes. This includes reimbursing the employees for any loss of earnings or benefits resulting from the changes. The make-whole remedy shall be computed in accordance with *Ogle Protective Service*, 183 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). It also includes making any benefit contributions on behalf of eligible unit employees that have not been made since the date of the unlawful changes, plus reimbursement of unit employees for any expenses incurred as a result of Respondent's failure to make the required contributions to their health and welfare fund accounts, such amounts to be computed in the same manner as backpay described above. Finally, the Respondent shall be ordered to pay any other amounts due the health and welfare funds, less any amounts that the fund would have paid out for covered claims but did not pay out as a result of the Respondent's unlawful implementation of its final offer in the absence of a valid impasse.

In accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, file with the Regional Director for Region 5 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Finally, the Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the employer's facilities or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 27, 2017. When the notice is issued to the employer, it shall sign it or otherwise notify Region 5 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>42</sup>

# ORDER

The Respondent, American Security Programs, Inc., its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying Union Patriots of Plaza (the Union) and giving it an opportunity to bargain.

(b) Failing and refusing to bargain on request with the Union as the exclusive collective-bargaining representative of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

## 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the changes in the unit employees' terms and conditions of employment contained in the Respondent's last, best, and final offer that were unilaterally implemented on about November 27, 2017.

(b) Make the unit employees whole for any loss of earnings and other benefits, including reimbursement for an expenses incurred as a result of the Respondent's failure to make the required payments since about November 27, 2017, in the manner set forth in the remedy section of this decision.

(c) Compensate the affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director of Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Make all contractually required contributions to the Union's health and welfare and other funds on behalf of all eligible unit employees that it has failed to make since about November 27, 2017, if any, with interest, plus any other amounts due the health and welfare funds, less any amounts that the fund would have paid out for covered claims but did not pay out as a result of the Respondent's unlawful implementation of its final offer in the absence of a valid impasse.

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<sup>42</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time security officers employed by the [Company] at the Patriots Plaza I and II Buildings currently located at 395 and 375 E Street, S.W., Washington, D.C.; but excluding all office clerical employees, managerial employees, and supervisors as defined in the Act.

(f) Within 14 days after service by the Region, post at its facilities in Washington, D.C., a copy of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 27, 2017.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 14, 2018



Michael A. Rosas  
Administrative Law Judge

## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying the Union Patriots of Plaza (the Union) and giving it an opportunity to bargain.

WE WILL NOT fail and refuse to bargain on request with the Union as the exclusive collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the changes in your terms and conditions of employment that were unilaterally implemented on about November 27, 2017.

WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits resulting from our unlawful unilateral implementation of terms and conditions of employment on about November 27, 2017, plus interest.

WE WILL make all contractually required contributions to the Union's health and welfare funds on behalf of all eligible unit employees that we have failed to make since about November 27, 2017, if any, with interest, plus any other amounts due the health and welfare funds, less any amounts that the fund would have paid out for covered claims but did not pay out as a result of the Respondent's unlawful implementation of its final offer in the absence of a valid impasse.

WE WILL file with the Regional Director of Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time security officers employed by American Security Programs, Inc. at the Patriots Plaza I and II Buildings currently located at 395 and 375 E Street, S.W., Washington, D.C.; but excluding all office clerical employees, managerial employees, and supervisors as defined in the Act.

**AMERICAN SECURITY PROGRAMS, INC.**

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-2700  
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/05-CA-211315](http://www.nlrb.gov/case/05-CA-211315) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2880.